IN THE

# Supreme Court of the United States.

## No. 231.

OLD DOMINION STEAMSHIP COMPANY

vs.

COMMONWEALTH OF VIRGINIA.

In Error to the Supreme Court of Appeals of the State of Virginia.

## REPLY BRIEF FOR PLAINTIFF IN ERROR.

It is to be regretted that the Attorney General has not seen fit to address his argument to the only contention urged in behalf of the plaintiff in error.

The question involved and discussed in the opening brief is plainly stated on the first page thereof, as follows:

CAN THE STATE OF VIRGINIA CONSISTENTLY WITH ARTICLE I., SECTION 8, CLAUSE 3, OF THE

CONSTITUTION OF THE UNITED STATES AND THE ACTS OF CONGRESS PURSUANT THERETO LAWFULLY TAX VESSELS OWNED BY NON-RESIDENT CITIZENS, DULY ENROLLED UNDER THE NAVIGATION LAWS OF THE UNITED STATES LICENSED FOR AND ENGAGED IN THE COASTWISE TRADE?

There is positively no suggestion that it was beyond the power of the State to tax tangible property on land within its jurisdiction, though owned by a non-resident, but the distinction between all such property and vessels enrolled under the laws of Congress at a port outside of the State of Virginia where the owner resides, is emphatically stated and relied on.

This distinction is made plain on page 10 of the opening brief, as follows:

> "In a word, United States vessels differ in many essential and material respects from all other personal property, and the rules with reference to the taxation of personal property on land are not a guide to the taxation of ships. If ships could be taxed at any port where they habitually call or where they may trade, great uncertainties would arise and injustice result. Hence the Supreme Court of the United States has uniformly held that because of their peculiar nature and employment and because Congress has fixed their 'home port' they cannot be taxed as of their actual situs, but only at their 'home ports.' "

Such being the conceded case of the plaintiff in error, we repeat our regret that the greater part of the brief for the Commonwealth should be devoted to the consideration of

matters not involved in this controversy, and we will not further revert to the first seven pages of the same.

We are also constrained to this course, because of the limited time for the filing of this reply.

The Attorney General substitutes his own inferences for the certified facts.

For instance, commenting on our contention "that the boats are engaged mainly in interstate commerce and only incidentally" in any other business, he says, p. 8:

> "As to this contention, I observe, first, that it is impossible that it can be true that the intra-state business of these lines is 'purely' incidental."

And again:

> "It is, perhaps, unfortunate that there seems to have been no evidence before the State Corporation Commission as to the extent of the intra-state business of these lines. It would be passing strange if it did not constitute a very large percentage of the aggregate business."

A reference to the certified facts, record p. 11, will show that the Corporation Commission after stating that the plaintiff in error was a Corporation of Delaware engaged in interstate trade between New York and Norfolk, certifies as follows:

> "That any other business transacted by the above named vessels was incidental in character and comparatively insignificant in amount."

In spite, therefore, of the incredulity of the Attorney General, the above is a controlling fact in this case.

The same is true of the *regularity* of the license and enrollment of these vessels, about which the Attorney General betrays a similar unwillingness to abide by the certified facts.

Among such facts, page 11 of the record, is found the following:

> "That each and all of the said vessels were *regularly enrolled* under the United States laws outside of the State of Virginia, with the name and port of such enrollment painted on the stern of each of them."

We submit, therefore, that with the *regularity* of the enrollment of these vessels so *emphatically certified*, there is no room for the apparent doubt found on page 9 of the opposing brief, as follows:

> "The record fails to disclose *where* these vessels are enrolled."
> "If they are properly enrolled, their enrollment is presumably, &c."

The *facts certified* equally do not justify the assertion of counsel, page 9 of his brief, that the place of enrollment "may be technically the 'home port' of these vessels, although it may be, and doubtless is, true that none of them ever was or ever will be in the port of New York, or ever will be outside of the landlocked waters of Virginia where they are all permanently located and regularly engaged, day after day and year after year, in plying exclusively between Virginia ports, never for an instant going outside of her territorial boundaries and

rightful jurisdiction." With even greater force do these comments apply to similar statements on p. 13 of opposing brief. There is absolutely nothing in the record to justify these assertions. On the contrary, the record, p. 11, expressly states:

> "That the said vessels were built and designed for the interstate traffic especially, and were adjuncts to or branches of the main line of the Old Dominion Steamship Company between New York and Norfolk. * * * * * that the said vessels though regularly enrolled and licensed for coastwise trade were then used on old established routes upon navigable waters within Virginia."

The nature of the business transacted by these vessels is found among the certified facts, p. 11 of record.

The Attorney General seems to confound the *permanency*, so to speak, of these vessels in Virginia with that of the "old established routes." The very character of the construction, the license and enrollment of these vessels demonstrate that while they were employed at the time in Virginia waters they were licensed for and engaged in the coastwise trade, liable and ready to go wherever such trade might demand.

He quite authoritatively insists that "In such case, the *artificial* will yield to the *actual situs*, and the latter will determine the just and the legal *locus* of the property for taxation," adding, that "these views are fully sustained by the following adjudications."

*Northwestern Lumber Company v. Chehalis County*, 64 Pac. Rep. 909.

*National Dredging Co. v. State*, 99 Ala. 462.

*Norfolk & Western Railway v. Board of Public Works*, 97 Va. 23.

*Minturn et als vs. Hays*, 2 Cal. 590.

We do not agree with opposing counsel in his estimate of these cases.

1st. *The Northwestern Lumber Company v. Chehalis County*, 64 Pac. Rep. 909. The Court in this case seems to have rested its decision very largely upon the following considerations. Speaking of the vessels under discussion, the Court says:

> "They appear to have been used for all these years as appurtenant to, and a part of, the lumbering plant and business of the plaintiff in Chehalis county. Upon these facts we conclude that the situs in fact of the three tugs is in Chehalis county, and that there was a valid assessment levied upon their value."

It further appeared in this case that the Assistant Secretary and Manager of the Company resided in Chehalis county, where the vessels were assessed for taxation.

2nd. *Norfolk & Western Railway Co. v. Board of Public Works*, 97 Va. 23. This case turned upon the fact that the vessel property was owned by a Virginia Corporation and were located in Virginia at the home of the owner.

3rd. *Minturn et als vs. Hays*, 2 Cal. 590. This case, upon an examination, is without any possible influence upon the question at issue. The steamboat sought to be taxed was dealt with by the Court precisely as if it had been the property or

land of a non-resident within the limits of California. Its character as a United States vessel was not even alluded to. Indeed, no law was invoked save the local law of California applicable to all property within the limits of that state, and by that law alone was the case adjudged.

4th. *National Dredging Co. v. State*, 99 Ala. 462. We admit that this case goes to the full length of counsel's contention and is directly opposed to ours.

The reasoning of the Court, however, does not appeal to our judgment. It speaks as follows:

> "There is nothing in the nature of this particular property to take it out of the general principle. The fact that it is floating property, and may be moved from place to place and port to port by water, furnishes no more reason for exempting it from taxation here than would exist for the exemption of property which did not float, and could be moved from place to place only over land."

The distinction between property on land and United States vessels is entirely ignored.

It is interesting, also, to observe the comment made upon this case in the work by Messrs. Prentice and Egan, styled the COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION. On page 235 the authors, commenting on the Alabama case, say as follows:

> "It is very doubtful whether this case can be reconciled with the Federal law on the subject. No vessel has more than one home port, and that is fixed by the statute at the port nearest the residence of the

> owner. At that place the vessel must be registered and taxed. A rule which fixes situs at the actual location of the vessel is inconsistent with a rule which disregards actual location and determined situs by reference only to the residence of the owner."

In this work it will be found that our view of this question is adopted.

5th. *Johnson v. DeBarry Baya Merchant Line*, 37 Fla. 499. The estimate of this case taken by the Attorney General is not borne out by a careful inspection of the case itself. Its history is singularly possessive, like that of the case at bar. The vessels were used on the St. Johns River in Florida as adjuncts to the ocean-going steamers of the Clyde Line plying between that State and New York just as those of the plaintiff in error are used on the James River in Virginia. We have treated this case at length on pages 15 and 16 of our opening brief.

Under the third division of the Attorney General's brief, page 11, he again by innuendo assails the regularity of the enrollment and character of the vessels of the plaintiff in error. He says:

> "Whatever may be the purpose of such enrollment—however innocent it may be in this case—to sanction it for the purpose of granting immunity from taxation would be to throw down the bars and fling wide open the doors to fraudulent devices for such purposes."

He follows this with quite a vivid expression of alarm, lest the citizens of Virginia may be induced by the "accom-

modating disposition in the matter of granting charters to companies to carry on business beyond their borders" shown by certain of the States of this Union to fraudulently escape taxation in Virginia by having their vessels enrolled outside of that State.

While we sympathize with our opponent in the apparent sincerity of his alarm, we respectfully submit that his fears are ungrounded. The "home port" as required and defined by the United States Navigation Laws "cannot be selected capriciously or in fraud of law," as suggested by counsel. The residence of the owner is the first requirement of the law, and then follows the port of entry nearest such residence as the next requirement. These two complied with, and we have the "home port." There is no danger of Virginia citizens emigrating to New Jersey to find cover for their vessel property, because if they did, they would be subjected to taxation in that State.

There is nothing harsh or inequitable in the rule. Virginia and every other State is permitted to tax the vessels owned by its citizens, but none can tax vessels owned by citizens of another State and duly enrolled as United States vessels.

Probably no country has such a complete system of navigation laws as the United States. They cover every conceivable phase of commerce by water, and are such as to preclude any of the fraudulent schemes of designing vessel owners depicted by counsel. Every vessel navigating in the coasting trade as those in controversy, is required to have an enrollment

showing where the vessel was built and when, her name, the name of her owner and that of her master, that they are both citizens of the United States, her dimensions, the character of the vessel, whether steam or sail, and every conceivable detail, all of which have to be stated under oath and must be recorded in the United States custom house at the home port.

This enrollment must be kept on the vessel wherever she goes, under penalties, and is liable to inspection at any time and place by an appointed officer of the government, and must be surrendered when there is any change in ownership or residence of the owner.

If vessels so enrolled design engaging in the coasting trade they must procure a license from the proper port, making the prescribed oath as to ownership, etc., as above set out. This license runs for a year at a time and must be regularly renewed. Periodical reports must be made to the proper customs officers, and any change in ownership, masters, or indeed, anything affecting them is to be reported, especially change of owner.

See "Title L, Regulation of Vessels in Domestic Commerce," United States Revised Statutes.

It is one of the facts certified, that the vessels of the appellant are "regularly enrolled and licensed for coastwise trade." Record, p. 14.

We insist that the Attorney General has not met the sole question involved, which is:

*Can the vessels of a non-resident, regularly enrolled and*

*licensed for coastwise trade under the United States Navigation Laws, and engaged in commerce upon the navigable waters of the country, be taxed by Virginia because they trade habitually in her waters?*

We say they cannot in reason, law or the inherent nature of vessel property.

Again, we regret that the Attorney General has not discussed this nor commented on but one of the authorities cited in our brief in support of our contention.

He seems to concede the correctness of the proposition so far as such vessels may be *temporarily* within Virginia waters, by quoting with approval the language of the Court in

*Pullman Palace Car Co. v. Penn.*, 141 U. S. Rep. 18-23.

Opposing counsel misapprehends the true significance of the meaning of this Court in the language used by it in the case referred to. We allude particularly to the statement that ships or vessels "are not subject to taxation in another State at whose ports they *incidentally* and *temporarily* touch for the purpose of delivering or receiving passengers or freight." The incidental and temporary touching so referred to by this Court has reference to the inherent character and business of such vessels. They only touch the land incidentally and temporarily "for the purpose of delivering or receiving passengers or freight." They live upon the navigable waters of the country, and not, as Pullman Palace Cars, upon a fixed railway track. They, by the very nature of the business and trade

which they conduct, touch "land only incidentally and temporarily." Their home is upon the bosom of the navigable waters of the country over which the United States government has sovereign jurisdiction. That such is the meaning of the incidental and temporary touching at ports is abundantly borne out by the language of this Court in the paragraph immediately succeeding that quoted by opposing counsel, viz:

> "Between ships and vessels, having their situs fixed by act of Congress, and their course over navigable waters, and *touching land* (italics ours) *only incidentally and temporarily;* and cars or vehicles of any kind, having no situs so fixed, and traversing the land only, the distinction is obvious. As has been said by this Court: 'Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land."
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> *Pullman Car Co. v. Penn.*, 141 U. S., p. 23.

## THE TAX CANNOT BE JUSTIFIED ON THE GROUND THAT THE VESSELS RECEIVE THE PROTECTION OF THE LAWS OF VIRGINIA.

The quotation from the Pullman Car case just above given, quite sufficiently defines the only governmental authority over such property.

The Federal Government has created such property, regulates it, and alone protects it.

The question involved must be answered in the negative, without regard to the length of time the vessels may remain in Virginia waters.

We admit that the vessels are not exempt simply because they are engaged in interstate commerce, but insist that owing to their peculiar character and the recognized difference between commerce by land and commerce by water they can have no situs for taxation save that fixed by Federal regulation, viz: the "home port."

In conclusion we beg to urge upon the Court the following points:

First: That the legislation of Congress has stamped upon vessel property special and peculiar characteristics which distinguish it from all other personal property and which make it impossible to apply the rules applicable to property on land to vessels regularly enrolled under the United States statutes and engaged in commerce upon the navigable waters of the country.

Second: That as a consequence of these inherent qualities of such vessels and of the character of the navigable waters on which they alone can operate, it is impossible, equitably to have their actual situs control their taxable character, and hence the necessity for giving them a *legal home*, namely, the port of registration nearest the residence of their owner.

Third: Inasmuch as the certified facts in this case show that the vessels sought to be taxed by the State of Virginia are the property of a non-resident of that State and duly enrolled and licensed for the coastwise trade under the laws of the United States and engaged in commerce upon the navigable waters of the country, they are beyond the taxing power of the State.

Fourth: The fact that they are operating on established lines upon navigable waters within the borders of Virginia as adjuncts or feeders to other vessels of the plaintiff in error engaged in the coastwise trade between New York and Norfolk does not in any way cause them to forfeit their non-resident character or change their legal "home port."

WM. H. WHITE,
*For Plaintiff in Error.*